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April 18, 2022

**Via Electronic Delivery**

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**Re: File No. S7-21-21; Share Repurchase Disclosure Modernization**

Dear Ms. Countryman:

We appreciate the opportunity to comment on the U.S. Securities and Exchange Commission ("Commission") proposed amendments to the disclosure regime for reporting repurchases of an issuer's equity securities (the "Buyback Proposal").

Our firm is the premier provider of legal services to technology, life sciences, and growth enterprises worldwide. We represent over 300 public companies and have represented over 300 issuers in initial public offerings since 1998. We regularly advise public companies and their officers and directors regarding share repurchase programs, including accelerated share repurchase programs ("ASRs"). We generally support the Commission's efforts to improve the quality, relevance, and timeliness of information related to issuer share repurchases; however, we believe that many aspects of the Buyback Proposal are problematic, will impose additional administrative costs on issuers with little benefit for investors, and may result in less overall issuer buyback activity, which would have the effect of returning less capital to stockholders in general.

**Comments Regarding Proposed Form SR Next Day Reporting**

We do not believe that any perceived benefits of daily reporting of repurchases of issuer equity securities outweigh the many concerns.

We are concerned that daily reporting of repurchase activity—and the corresponding absence of reporting when such repurchase activity has stopped—is more likely to cause market speculation and subject public companies to investor inquiries that they may be unable to answer. Accordingly, we believe any benefits of proposed Form SR are outweighed by the challenges that it would cause issuers. In that regard we note:

- There will be significant costs—both in time and money—associated with daily reporting of share repurchases, and while that cost will be borne by all public companies, it is likely to be more acutely felt by smaller companies with fewer internal resources.

- When a company's real-time reporting stops, market participants will be left to speculate whether repurchase activity has ended as a result of current repurchase objectives being met or as a result of the company coming into possession of material, nonpublic information.

- Daily, detailed information regarding share repurchases will make it easier for professional traders to front run or engage in other practices that could artificially inflate the price of an issuer's stock.

- There is no materiality threshold for repurchase activity disclosed under Form SR, resulting in the market being flooded with potentially irrelevant information.

- The Commission does not require real-time reporting from institutional investors, or even from activist investors whose intent is to take over control of the company.[1]

- Real-time reporting of repurchase activity could distort a company's cost-benefit analysis, resulting in alternative capital return activities (e.g., dividends) being favored when there is no policy reason for favoring one means over another.

Accordingly, we believe that Form SR is not necessary and that the current reporting regime, which requires issuers to report repurchase activity quarterly in their Form 10-Q or Form 10-K, aggregating repurchases on a monthly basis and providing average repurchase prices, remains the preferred approach and adequately balances the competing requirements of public companies and their investors. If the Commission believes that more frequent reporting is necessary, however, monthly reporting, still on an aggregate basis reporting average repurchase prices, would alleviate many of the concerns noted above.

We do not believe, however, that reporting the amount of repurchase activity done pursuant to Rule 10b5-1 and Rule 10b-18 would provide material information to investors, and these aspects of the Buyback Proposal should be dropped from the final rules, if any.

<u>If the Commission adopts Form SR, it should provide guidance on how to complete it when required information is not yet known</u>.

As discussed above, we do not believe that the Commission should adopt Form SR. If, however, it moves forward with its proposal, certain clarifications should be made. The proposed general instruction to new Form SR states that in the event that purchases are made by an issuer, Form SR must be furnished "before the end of the first business day following the day on which the share repurchase order has been executed." In the proposing release for the Buyback Proposal, the Commission indicated that its view is that the date of execution is the date on which the parties become irrevocably bound to a repurchase transaction under applicable law.

[1] Even though the Commission's recently proposed "Modernization of Beneficial Ownership Reporting" rules (File No: S7-06-22) would shorten Schedule 13D and 13G filing deadlines, they do not contemplate next-day reporting.

In certain types of repurchase transactions, particularly ASRs, data required to be included on new Form SR is not known on the business day following execution, and in many instances may not be known for weeks or months.

In a typical ASR, an issuer agrees to purchase a fixed dollar amount of its common stock from a dealer. The aggregate number of shares repurchased in a typical ASR is determined by reference to the average price per share reported in public secondary market transactions over the duration of the ASR, less a fixed, negotiated discount.

ASRs range in duration from a few weeks to a few calendar quarters, depending principally on the relationship between the dollar amount of the repurchase and the average daily trading volume of the issuer's shares.

In most ASRs, at inception the issuer prepays the full fixed dollar amount and receives a significant delivery of its shares from the dealer. This up-front delivery is generally negotiated to have a notional value of at least 70% of the fixed dollar prepayment based on the closing price per share on the day the ASR is executed. Once the average price per share is determined at maturity of the ASR, the dealer is typically obligated to make an additional delivery of shares, though in remote circumstances the issuer may owe a payment (which may be in cash or shares) to the dealer.

Thus, on the business day following execution of an ASR, the total number of shares to be repurchased and the average purchase price per share is not known and therefore cannot be included on Form SR.

We urge the Commission to clarify that the period during which an issuer may timely furnish Form SR does not commence until all relevant data to be included in Form SR are known. For example, if the final rule maintains the one business day deadline for furnishing Form SR, an issuer should be required to furnish Form SR on the business day following the day on which the aggregate number of shares repurchased and the average price per share is known at maturity of an ASR.

We caution against an approach that would require earlier disclosure of the initial delivery of up-front shares as this might lead to an inaccurate perception among the investing public that the full fixed dollar prepayment was made only in respect of the partial initial delivery of shares. During the period between the initial exchange of shares and cash and the maturity of the ASR, it might appear to some members of the investing public that the issuer has paid a substantial premium over the market price of its shares. The actual number of shares repurchased and the average price per share paid pursuant to an ASR at its maturity is highly likely to differ significantly from any placeholder data that could be furnished on the business day following its execution. In addition, while remote, it is possible that the issuer will be required to return some portion of the up-front share delivery to the dealer if the issuer's stock price has increased significantly over the term of the ASR.

Rather than requiring issuers to furnish incomplete, inaccurate and potentially confusing information to the Commission that will be publicly disseminated, the Commission ought to clarify that Form SR need only be furnished once all relevant data is known with certainty.

The administrative burden on companies and insiders from adoption of the Buyback Proposal suggests that there should be a significant phase-in period between adoption and effectiveness of any final rules.

If the changes included in the Buyback Proposal are adopted, even if modified, public companies will need sufficient time to comply with the new rules, including time to reconsider the effect of the rules on their repurchase activity, to work with the brokers they use to conduct repurchase activity, to update their internal policies and practices, and to update their disclosure controls and procedures. We urge the Commission to include an appropriate phase-in period—between nine months and one year—from adoption of a final rule and effectiveness of the rule.

We appreciate the opportunity to provide these comments regarding the 10b5-1 Proposal. If you have any questions or comments do not hesitate to contact Richard Blake, Jose Macias or Allison Spinner.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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